STATE OF MICHIGAN

COURT OF APPEALS

MARK BURNSTEIN, ALAN BURNSTEIN, and LINDA BURNSTEIN,

Plaintiffs-Appellants/Cross-Appellees,

v

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
July 28, 2000

No. 212357
Oakland Circuit Court
LC No. 96-533342-NM

Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. Plaintiffs are the children and successors in interest to the estate of their deceased father, David S. Burnstein. The instant case stems from the resolution of an underlying litigation, brought by plaintiffs against Burnstein's accountants, the insureds. The underlying litigation was settled, and plaintiffs, as assignees of the insureds' rights under the insureds' professional liability policy with defendant, brought this action against defendant. Plaintiffs claimed defendant was liable for the insureds' professional malpractice, pursuant to the terms of the insurance policy. The trial court granted summary disposition in favor of defendant based on exclusions under the policy. Plaintiffs appeal as of right and defendant cross appeals. We affirm.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). "The construction and interpretation of an insurance contract is a question of law for a court to determine that this Court likewise reviews de novo." *Id*. If the language of the contract is unambiguous and "no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Id*. "Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists." *Id.*

An insurance contract should be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). The language of a policy should

be given its ordinary and plain meaning, and construed in light of the circumstances. *Bosco v Bauermeister*, 456 Mich 279, 300; 571 NW2d 509 (1997); *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71, n 1; 467 NW2d 17 (1991). To determine whether an event is covered by a liability insurance policy, a court must first consider whether the event is within the scope of the policy coverage before considering whether the event is otherwise excluded by the policy. *Fire Ins Exchange v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996). The scope of the coverage is determined by the terms of the insurance contract. *Id.*

After our thorough review, we conclude the lower court properly granted summary disposition in favor of defendant based on the exclusions to coverage under the insurance policy. The policy expressly excluded coverage for any contractual liability unless the insureds would still have been liable if the contract or agreement did not exist. "An exclusion of liability insurance coverage for contractually assured obligations to third parties is operative only where the insured would not have been liable to the third party absent the insured's agreement to pay." *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 514, 535; 540 NW2d 748 (1995). This was a contractual liability. We disagree with plaintiffs' argument that malpractice liability would still remain if the promissory notes did not exist. A strict interpretation of the language of the exclusion does not support plaintiffs' argument. Although plaintiffs' claim alleges the insureds were negligent in rendering accounting services to Burnstein, the negligence claim is based on the promissory notes given to Burnstein by the insureds. If the promissory notes did not exist, there would be no liability, contractual or otherwise.

Defendant was also entitled to summary disposition based on the dual entity exclusion. The insurance policy bars coverage for "any wrongful act happening while performing professional services" for any other entity of which an insured is "an owner, partner, trustee, director, manager or shareholder." Porvin and Tobes were fifty-percent owners and officers of Mellon Associates, Inc., for which Burnstein advanced the loans to Porvin and Tobes. Burnstein also made loans directly to Mellon. We agree with the trial court's determination that any wrongful conduct occurred while the insureds were acting for Mellon. Accordingly, defendant is not obligated to indemnify the insureds, and summary disposition was properly granted on this basis.

In light of our disposition, we find it unnecessary to address the issues raised by defendant on cross appeal.

Affirmed.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin